

The Relativity of Feminist Legal Theory on Abortion According to Fiqh Dharūrāt

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Abstract— This study seeks to analyze the epistemological problems from the theories of feminism and their critical point of legalizing abortion from the perspective of shari'ah through the analysis of fiqh dharūrāt. The method applied is descriptive-analytical with a philosophical approach that aims to analyze the paradigm behind the Dominance Theory, Critical Race Theory, and Postmodernism Theory, which feminists have promoted as the protection of women. The results of this study conclude that dominance theory provides the legality of abortion rights based on the doctrine of the sovereignty of a female's body without being bounded by morals or other values, including religion. Critical Race Feminist theory used the standard of abortion by considering women's discrimination experiences between white women and black women that create the issue of reproductive health as a form of fulfilling the right of all women's authority to get reproductive health services and determine the future of their bodies. Similarly, postmodern theory explains the legality of abortion rights without being bound by specific moral standards, and the assessment of good and lousy abortion behavior was not left by the justification of society but by the beliefs of the woman. Based on the philosophical basis of the three feminist theories above, the standard of dharūrāt on abortion rights becomes relative and flexible. Fiqh dharūrāt provided the guidance to prevent women from being trapped into relativism so that they could remain in the guidance of revelation and guidance of the shari'ah.

Keywords— Abortion, Feminist, Relativity, Fiqh Dharūrāt, Feminist Legal Theory

Abstrak— Penelitian ini berupaya untuk mengurai problem epistemologis dari beberapa kritik teori feminisme untuk membolehkan aborsi secara bebas ditinjau dari sisi hukum Islam melalui fikih darurat. Metode yang diterapkan adalah deskriptif analitis dengan pendekatan filosofis yang bertujuan untuk membongkar paradigma di balik teori dominasi, teori critical race, dan teori postmodernisme yang selama ini mengusung perlindungan perempuan. Hasil dari penelitian ini menyimpulkan bahwa paradigma dari teori dominasi menganggap aborsi dapat dilakukan dengan dasar kedaulatan tubuh perempuan yang tidak bisa dikekang oleh nilai moral atau nilai-nilai lain, termasuk agama. Teori critical race menjadikan standar aborsi dengan pertimbangan pengalaman diskriminasi di antara perempuan kulit putih dan perempuan kulit hitam sebagai pemenuhan hak perempuan untuk memunculkan isu kesetaraan layanan kesehatan reproduksi dan hak menentukan masa depan tubuh mereka. Adapun teori postmodern meyakini legalitas hak aborsi tidak terikat oleh berbagai standar moral tertentu, di mana penilaian baik dan buruknya tindakan aborsi tidak diserahkan pada justifikasi masyarakat tetapi pada keyakinan perempuan itu sendiri. Berdasarkan landasan filosofis ketiga teori feminisme di atas, standar darurat untuk bisa melakukan aborsi menjadi sangat relatif dan fleksibel. Implementasi fikih darurat memberikan panduan kepada perempuan agar tidak terjebak pengaruh relativisme tersebut sehingga mereka tetap berada dalam panduan wahyu dan syariat.

Kata Kunci— Aborsi, Feminisme, Relativitas, Fikih Darurat, Feminis Legal Teori

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A. Introduction

Implementation of the abortion practice and its legality in society has become a problematic debate that is still happening today, either against or in support of it, especially for feminists who think that the legality of abortion is one of the main problems in fulfilling a woman's body authority rights. One of the primary triggers in these efforts is the history of violations of women's rights and pregnancy discrimination, where women were fired when pregnancy showed so as not to embarrass customers, students, or co-workers even if the woman was doing her job competently. Based on this phenomenon, feminists moved and fought for their discourse to propagate every woman's authority to obtain her gender justice and reproductive health rights, starting from the scope of the society to voicing it into government policies, that makes feminist legal theory as one of the disciplines which in making legal decisions because they are solid legal doctrine.

There have been many studies on abortion from various perspectives, such as Islamic jurisprudence, positive law, and even health. Zulfa Handiyani, in her research, concluded that the law on abortion is *harām*, except in emergencies, such as medical reasons: the mother's life is threatened if an abortion is not carried out, or conditions where an abortion is forced, such as cases of rape, which may be carried out if the fetus is not yet 120 days old, whereas, for medical reasons, an abortion may be carried out even if the gestational age has reached 120 days (Hudiyani, 2021).

Yudha Ardy Tama and Rachmat Ihya compare abortion from the perspective of Islamic law and the Indonesian constitution. The results of the study show that abortion according to Fatwa of the Indonesian Ulama Council number 4/2005 states that: a) abortion is haram from the moment the blastocyst implants in the mother's uterine wall (nidation); b) abortion is permitted due to age, whether it is an emergency or necessity; c) abortions that are permitted due to old age as previously mentioned may only be carried out in health facilities that the government has designated; and d) Abortion is unlawful if a pregnancy occurs as a result of adultery. Regarding abortion, a review of legal regulations in Indonesia shows that the act of abortion is permitted in the Criminal Code (KUHP) and Law Number 36 of 2009 concerning Health (Tama & Rachmat, 2023). This research is strengthened by the findings of Fira Humaira, who concluded that Islamic abortion law and the Health Law allow it only if it is necessary and emergency.

Otherwise, it cannot be justified (Humaira, 2023). This conclusion is strengthened by the results of Muhammad Juni Beddu's research that the act of abortion, according to Law No. 36 of 2009 concerning abortion, including the Legalization of Abortion, was reviewed with articles 75, 76, and 77, which allows abortion with several provisions. Abortion is also permitted under the provisions of QS. Al-Isrā' (17) verses 31-33 and 'ulamā' (Islamic scholars) Opinions with provisions for abortion in emergency or forced situations, which are based on the Al-Quran and Hadith (Beddu & Putri, 2022).

Regarding abortion, a comparison of abortion laws results from rape according to Islamic and positive Islamic law, H.B. Syafuri, in his research, revealed that in the context of legislation in Indonesia, positive law and Islamic law have similarities. It seems that abortion is permitted provided there is a medical indication and both laws agree to prohibit individual abortion without medical personnel (Syafuri & Wahyudin, 2022). Nurhayana Khofifah Adisty Sagala explained that according to the law, article 346 of the Criminal Code of Indonesia, the threat of imprisonment is four years for women who deliberately or order someone else to kill or abort their pregnancy (Sagala et al., 2023).

According to YUSDANI, abortion, when viewed from a human rights perspective, can be permitted based on indications of a medical emergency or for reasons justified by law. Safe abortion methods are also following the implementation of the right to life in human rights and *hifzu al-nafs* in *maqāṣid syarī'ah*. Therefore, safe abortion must be supported and made more accessible so that the risk of maternal death due to illegal and unsafe abortion can be suppressed and minimized in the future (YUSDANI, 2022). However, Lilis Suryani revealed that illegal and risky abortion practices will continue to emerge and will be challenging to eradicate following the regulations contained in the law due to the difficulty of carrying out investigations and the closure of information about the existence of illegal abortions (Suryani, 2021). If seen from the study of medical bioethics, abortion for pregnancies resulting from rape which caused mental health disorders, can be handled by applying the principles of beneficence and non-maleficence, respect for human dignity and human rights, respect for autonomy, and respect for confidentiality and privacy. The act of abortion due to rape is legally regulated in Indonesia and several countries. However, its implementation is still challenging in providing access to information and adequate health services (Askia et al., 2024; Hakiim et al., 2022).

Suppose we analyze from a legal perspective regarding abortion in other countries. In that case, the Dutch abortion law is in a very loose legal position in line with several different countries, such as the US, France, Italy, Turkey, Tunisia, and Singapore, which allow abortion at the request of pregnant women for various reasons. It means that women have complete freedom to continue or terminate their pregnancy for different reasons. It was due to changes in views regarding population control before World War II. It reached its climax after World War II, which formed the public opinion that the legal regulations regarding Dutch abortion were unsatisfactory in all aspects, so based on legislative policy on 1 May 1981, the Abortion Law was enacted. Stb content. Of 1981 number 257, later amended by Law 6 November 1997, Stb. 1997, 510. The existence of this law made a significant change in Dutch abortion law, from the conservative to the most liberal (Azizah & Rafsanjani, 2022).

The difference between this research and previous research lies in the object and approach. This research object focused on the philosophical basis of abortion and implemented the Islamic philosophy in an analytical approach, which underlies the emergency (*fiqh ḍarūrāt*). This article attempts to examine abortion based on legal feminist theory, which gender activists and liberal feminists use to provide a philosophical basis for women to be free and independent in doing so. As the author explained, the analysis used in this research does not use a legal approach (*fiqh*). Still, the analysis uses a legal philosophy perspective from *fiqh ḍarūrāt* and not a legal perspective.

B. Methods

The researcher used the Normative research type, commonly known as library research or document study, which was typically focused on legal literature, statutes, court decisions, contracts, legal theories, and scholarly opinions (Bambang Waluyo, 1996; Sovia et al., 2022). This research is also characterized by descriptive analysis, where the researcher analyzes to provide a description or explanation of the subject and object of the research as the research results (Muhaimin, 2020).

The stapes of techniques in descriptive analysis began with grouping the same data and information according to sub-aspects, then with interpretation to give meaning to each sub-aspect and its relationship to each other. After that, analysis or interpretation

was conducted on all aspects to understand the meaning of the relationships between one aspect and another, as well as their connection to all elements that constituted the main problem of the research. This process was conducted inductively to provide a complete picture of the results (Solikin, 2021).

After determining the research type, it appears that the researcher focused on selecting an approach, interpreted as an effort to establish a connection with people or a method to understand the research problem (Muhaimin, 2020). In this case, the researcher thoroughly chose the philosophical approach, as according to Achmad Ali, this approach focused its study on viewing law as a set of abstract ideas and moral ideas, including moral justice (Ali, 2005). Therefore, the research was conducted based on the theory of feminist legal theory, which was analyzed using appropriate concepts and provisions in Islamic law. In this context, *fiqh dharurat* was utilized as a supporting theory for the researcher's analysis.

C. Results and Discussion

The Paradigm of Feminist Legal Theory for the Legality of Abortion

The history of the legality of abortion rights began when, for the first time, Justice Samuel Alito, an American jurist who serves as an associate justice of the Supreme Court of the United States, wrote several foundations for making the country progress: claiming protection of religion freedom, giving control to women to restrict the pregnancy, recognizing women's equality to participate in economic aspects and empowering women to manage life reproduce them in society (West & Bowman, 2019).

Commonly, abortion contains two types: the first, Spontaneous abortion, which occurs unintentionally and is caused by factors beyond the mother's control, such as medical reasons or accidents, and the second, therapeutic abortion, which induces termination of a pregnancy with destruction of the fetus or embryo, (Stedman, 2008) which many women often pursue to stop an unwanted pregnancy due to reasons related to mental readiness, economic concerns, or simply their unwillingness, and then becomes propaganda campaigned by feminists to fulfill women's rights over their body autonomy and demands on the government to consider these reasons in the formation of laws and policies. It became the feminist supporting point to legalize abortion as a form of authority for women's reproductive health and body rights.

They are considering the issue of abortion legalization as propaganda that has always been conveyed, even since the first wave in the history of feminism's emergence, as the right of women to have autonomy over their bodies, which are their property and can be managed according to their own will. Then, all this history became the origin of the emergence of feminist propaganda in government legal policy that exists today as Feminist Legal Theory, where the implications of these thoughts did not only consist of one theory but consisted of various kinds of theories. The theories that are often used by feminists about fighting for abortion rights were followed:

a) Dominance Theory

The dominant feminist theory focuses on power differences between women and men. This theory was first introduced in 1979 by Catharine MacKinnon, one of America's foremost feminist legal scholars and theorists who focused on power relations between men and women. This theory appears from the beliefs of feminists that the occurrence of differences caused by historical facts inherent in society make men the holders of top positions and privileged while women occupy the bottom of positions and are oppressed. Similarly, Catharine MacKinnon says:

“the ways men are dominant and privileged, Men's physiology defines many sports, health insurance coverage coverage is defined by their needs, their experiences, and obsessions define merit, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their presence defines family, their objectification of life defines art, their military service defines citizenship, their inability to get along with each other—their wars and rulership—defines history, their image defines god, and their genitals define sex.”(Levit & Verchick, 2006)

They carried up the argument that laws and policies should be able to embrace and re-understand the essence of the lawfulness of abortion rights, which was an issue in reproductive health that removed a woman's ability to make decisions to control their actions for their right during pregnancy is to deprive women of their legal personhood (L. M. Brown, 2005). Also, they believe that public life is still patriarchal and men still dominate the position of women, which is the main reason the issue of oppression and discrimination against women continues (Siraj, 2015). This experience then triggered various movements in every opportunity to uphold women's rights through gender

equality statements aimed to eliminate all forms of gender discrimination that women experienced over the phenomenon of inequality due to male domination.

Elizabeth Grosz, an Australian philosopher and feminist theorist, admitted that without the influence of the formative role on recognition, which eventually became the enforcement of power, it would not provide a voice for feminism to debate various rules related to the patriarchal system (Grosz, 1994). They emphasized that this theory is a solution to the many branches of view that have formed various abstract thoughts, which should be able to distinguish the dichotomies of nature and culture, self and other, private and public. For example, on the legality of abortion rights, feminists want to give women the right to make decisions to conceive, both by accepting decisions and the opportunity directly or considering them before making their choices first (L. M. Brown, 2005).

The authority of women's bodies, which is considered for the legality of abortion rights, is the brainchild of feminists who assume that often, the role of men is separated from responsibility and sanctions in society for the cases of unwanted pregnancies resulting from the fulfillment of sexual desires between men and women (Shahaluddin, 2022). Robin West concludes feminist arguments through this theory in her book that they firmly believe the legal standards that tend to be dominated by men should not regulate rights and privileges concerning women, including the legality of abortion rights (West & Bowman, 2019). The needs and attention to aspects of women based on their experience must be protected, and considering the doctrine, the power of equality is campaigned by the world, and opportunity is based on the relative requirements put forward with women in society. In another sense, all forms of disputes concerning the legality of abortion rights must be rejected in the interest of fulfilling women's rights.

b) Critical Race Theory

Critical race theory was born from the movement of critical legal studies that analyzed laws by impacting people of color with the belief that many laws were not neutral or objective, so they spread criticism of legal policies and rules influenced by one's race (Winters & Esposito, 2010). Nancy Levit explains that the purpose of this critical race theory is an effort to fight black women in the scope of racism and sexism experience (Levit & Verchick, 2006). Especially the different violence received by them from the experience that most white women have. So, they focus on studying theory and building a critique of the inequality of expertise caused by race. Because the phenomenon

and history of oppression that occurs in women is not only limited to being carried out by cross-gender between men and women as the theory of dominance. But the fact also occurs within the scope of gender itself, in the form of discrimination committed by women's groups between white women and black women, which then creates hegemony in one group over the other.

Robin West, in her book *Research Handbook on Feminist Jurisprudence*, identifies this critical race theory always plays a role in the issue of reproductive rights and feminist justice is caused by various acts of discrimination that occur against women of color, such as discrimination against pregnant black women for drug use, punish procreation, immigration restrictions and medical abuse of incarcerated pregnant women on the reproductive rights (West & Bowman, 2019). It is also documented in history that since the middle of the 1990s, black and brown feminists have battled for reproductive justice. Still, their issues have not been addressed within the mainstream feminist movement. They confronted intersectional barriers at a greater level, which prevented them from participating in the mainstream reproductive rights movement that the predominantly white and middle-class feminists led. The objective of the reproductive rights movement failed to confront the terrible history of Black women sufficiently and was devalued by the social and economic policies movement's agenda (Ross, 2017). Therefore, black women began organizing their activist coalitions as a result of growing dissatisfaction with the mainstream feminist pro-choice movement's failure to acknowledge their intersectional agenda. Like Sister Song, the Women of Color Reproductive Health Coalition is the oldest and biggest activist group. It was founded in 1997 with reproductive justice as its main idea (Ross, 2016).

So, based on the history of women within the United States, it was found that people of colour have a painful history and deeply complex of controlled reproduction, which then from this history makes a point of struggle through various feminist movements ranging from the existence related to slavery to movements that correlate with today (KY et al., 2016). The discrimination and violence perpetrated around discriminatory behavior and racism indeed bleed into Assisted Reproductive Technology (ART) and reproductive health care as a form of racial experience (Fassin, 2001). For instance, black women on welfare have been sterilized without their knowledge or consent, and others have been

forced to accept sterilization in exchange for a continuation of relief benefits. Additionally, they have shown how pregnant black women who use drugs are more likely than white women to be prosecuted on drug charges or for child endangerment, abuse, or neglect (Levit & Verchick, 2006).

The supporting idea of this theory conveyed that the form of oppression that women experienced there was no longer based on hegemony and male domination. Still, this feminist theory continued to develop, including oppression and discrimination by race. Therefore, the struggle between feminism and racism against discrimination experiences was like siblings that could not be ignored and became a discussion of feminist discourse to support women's rights, especially in gender justice and freedom in the authority of women's bodies without discrimination.

c) Postmodern Theory

Analysis of Postmodern theory began through a method known as "deconstruction," developed in the 1960s and 70s by the French philosopher Jacques Derrida. It took a movement against social criticism, incompatible with traditional philosophical underpinnings, by creating a new paradigm (Edman, 1997). Nancy Levit argues that feminists who induce an understanding of postmodern theory focus on the categorization and meaning of gender. Gender is not seen as a division of natural standard and objective factors. Still, it is formed from social constructions that prioritize every woman's experience and the importance of the current situation in acquiring it (Levit & Verchick, 2006). Viewed descriptively, this theory argues that law and gender are not shaped by separate concepts but as a single entity. Therefore, gender does not exist except for law and other social structures, where society's many meanings influence law formation to gender and other aspects of identity. As for normatively, postmodern feminist legal theory argues that feminist legal reform constructs gender evenly, which means that law is more than a simple tool of oppression or liberation (West & Bowman, 2019).

Feminists, through postmodern theory, said that the role of mothers that is imposed by the culture of social thought must also coexist with women's readiness because every woman also has the right to choose her future. The study of the science of forming bonds of motherhood was not a practice carried out unilaterally by individuals or the influence of impulses on the part of group authority. Still, it was more than a relationship with each other, which could be formed through a series of stages and actions (O'Reilly, 2021). So,

this motherhood can only appear and intertwine with the readiness of a woman both mentally and psychologically maturely to assume the responsibility of giving birth, caring for, and educating her future child. So, suppose it is drawn given the legality of abortion rights. In that case, the feminist believes that the consideration of the interests of every woman is a priority that must be met from the standard of relative feminist needs. It is also based on the belief that the uterus and organs are absolute rights that women have and must not be governed or ruled by religion, state, and men. So, abortion becomes a right and choice in deciding the management of women's bodies that must not be justified by faith and societal values (Shahaluddin, 2022).

This is caused by the stigma of abortion inherent in society, which has created gaps in flawed justifications for abortion perpetrators, where this behavior has a crucial impact on context, race, religion, and regions such as the United States (K. Brown, 2022). It is an essential element in the beliefs attached to and defended firmly by society. So, feminists want to change the various values of society through deconstruction. They guarantee that society's views never confront every woman and restore the right of their authority to determine the future of their bodies as Cockrill and Nack found that women who demand the legality of abortion rights often try to influence and change the social stigma surrounding the practice of abortion through vague and slow disclosures, such as declaring women's authority as a necessity and interest of fulfilling women's rights or proposing various criticisms and rejections of arguments from the standpoint of supporters of the Right to Life regarding the legality of abortion rights (Cockrill & Nack, 2013).

In addition, Judith Butler, in "Contingent Foundations (1995)", examines the concept of postmodern feminine subjectivity as a future of "multiple specifications" and details that the realization of "agency" only comes through allowing the category of women from a fixed referent (Butler, 1994). Additionally, the postmodern method of comprehending the relationships between language and power encourages a reevaluation of conventional gender identities, making them less dependent on cultural norms or biological sex and more flexible. Postmodernist feminists see gender as socially constructed, relative, experience-based, malleable over time, and contingent on circumstances rather than innate, fixed, or objective (Levit & Verchick, 2006). Because

of that, postmodern feminist legal theory established a framework for a renewed understanding of gender at a time when all feminist legal reforms emphasized unity and deep concepts simultaneously. Where its supporters voice the movement for change in gender justification tends to be often accepted by women, especially about morals, religion, and psychology. To uphold gender justice, women should get freedom and support from all parties.

The Rights of Abortion Based on Feminist Legal Theory According to Fiqh Darūrāt

On the other side, the definition of abortion in Islam is *al-isqāt*: The child, whether male or female, who is expelled before completion, and it is visible in its creation, (Al-Fayumī, 1909) Or “the child is expelled from its mother's womb before completion, and it is not a condition for it to be visible in its creation (Al-Zubaidī, 1965). Linguistically, the term “abortion” does not distinguish whether the abortion occurred spontaneously or if it was the result of a criminal act or medication (Al-Dubyān, 1426). Wahbah Az-Zuhailī argues that abortion is performed based on a crisis that causes a condition threatening the mother or fetus (Al-Zuhailī, 1405). Similarly, Muḥammad Sa‘īd Ramadhān Al-Būthī suggests that abortion may be performed in case of emergencies, such as dangerous diseases that threaten the safety of the mother during the life of the fetus conceived not more than three months (Al-Būthī, 2003).

Wahbah Az-Zuhailī also explains that a person who is in an emergency (i.e., in a situation where if he does not consume an unclean item, of course, he dies) is forced by the situation to eat what Allah forbids. He did not find anything and feared that he would die. At the same time, he did not want the object itself and not exceed the limits of necessity then there is no sin against it; to preserve the soul and not to let it perish besides being in a state of near-death from starvation is a greater danger than eating carrion and blood (Al-Zuhailī, 1418). These provisions are detailed in *fiqh darūrāt*, a *fiqh* that aims to solve various problems caused by difficulties and emergencies by explaining the rules of Islamic law in responding to the situation (Al-Bayānūnī, 2011). As Imām Ibn Taymiyyah argues that:

“Bad cases (sayyi’ah) can be chosen for two reasons and purposes: First, by avoiding the option with the greatest adverse effect if, in a case, you have to select one or more of the same two things that have a bad effect. Second, by taking the option with the least adverse impact if, in one case, there is no option but to choose one of them.” (Ibn Taymiyyah Al-Harānī, 1416)

The observing of the discourses on the legality of abortion rights policies by feminists through the theories that they convey will not be separated from the various gap points that syarī'ah can criticize through the *fiqh dharūrāt*. Among the main criticisms and analyses of the feminist theories are:

a) The Secularization of the Concept of Body in the Dominance Theory

In dominance theory, the legality of abortion rights is based on the doctrine of the sovereignty of a female's body without being bounded by morals or other values, including religion. Thus, the legality of abortion rights is desired by supporters of this dominance theory, which prioritizes women's experience as a significant factor. Feminists were demanding policies on this matter as a solution and fulfillment of women's rights when they did not want to conceive and become mothers for reasons of economic, age, and mental factors until other factors followed future decisions concerning the state of their bodies.

It goes outside of the emergency interests determined by Islam, as Muḥammad Abū Al-Fatāḥ Al-Bayānūnī conveys the prohibition points in the rules related to the implementation of *fiqh dharūrāt* (Al-Bayānūnī, 2011). This is considered an excessive attitude in creating flexibility that exceeds the needs limits, such as inserting tertiary needs (*taḥsīniyyah*) into urgent needs (*darūriyyah*). The meaning of tertiary needs applied to the legality of abortion rights by feminists is the tendency to demand freedom from the pressure caused by the domination of men's roles on women's right to control choices over their bodies, referring to the nature of *taḥsīniyyah* needs as what is intended to be done as a kind of luxury and an increase in the softness of living (Abū Al-Ḥārīs Al-Ghazī, 1416). So, the demand from this is used as an advantage for feminists to justify all their behavior even though it violates Islamic provisions by relaxing the standards of emergency as determined by the '*ulamā*.'

As viewed from the health side, the application of the legality of abortion rights freely will make it easier for women to do so that the tendency to repeatedly abortion in women can occur due to this case, especially among the individuals who provided traditional abortion practices under the pretext of providing opportunities for women from minority groups and low socioeconomic status that could not access abortion safely to meet their needs. Although it satisfies their momentary importance, abortion practices do

not include the limits of self-medication with toxic chemicals such as turpentine, bleach, detergent solutions, quinine, and strong teas (Rivera Rodriguez et al., 2022). So, it has a bad impact on women ultimately and the end of death because it is solely to benefit unscrupulous providers who meet women's demands without considering the health side.

Based on the impact that the legality of abortion rights can cause, it can not provide the best solution to prioritize the authority of women's bodies and rights because it is the same as an effort to eliminate the problems experienced by women by bringing new issues then, so it is not the best problem solver behind the movement of equality and support for women's rights and choice of body. Therefore, Islam has stipulated the provisions of the implementation of the legality of abortion rights based on emergency endangering the mother as the main reason. In addition, feminists, through the demands of body authority on the legality of abortion rights, will distance their values and nature as women, especially if it is done by *Muslimah* who believe in the teachings of Islam, and forget that the essence of human creation in the world is a creature belonging to Allah alone, which also applies to the entire human body and soul without exception.

**b) The Weakness of the Concept of Discrimination as a Highest Level of Emergency
(Dharurat) in the Critical Race Theory**

The legality of abortion rights in critical race theory was justified sufficiently based on women's experience of discrimination until the opportunity for abortion opened widely. This has unintentionally caused new problems, starting from all manifestations. Various forms of discrimination that black women have accepted become wounds and suffering that have been pent up for a long time (Lang & Spitzer, 2020). Every opportunity that gives space for black women to voice their experiences of discrimination that has been received makes an effort to vent emotions and demands to take revenge for their dark history that has never paid off (Heymann et al., 2023). So this event is like an 'iceberg' theory that makes them so loudly voice support for propaganda by keeping a big chunk of trauma behind it. However, what feminists strive for the issue of women's discrimination through critical race theory by making the element of anticipating discrimination based on women's experience as a benchmark for the legalization of abortion rights often hurts its excessive nature because it seems to make them make the standard the highest priority to be applied. In the professional world, Black ethnicities are "compelled" to assimilate to various cultural norms of the majority. Black professionals

encounter pressure to conform to prevailing cultural norms within the workplace, as evidenced by quantitative data from 14 one-hour interviews. The findings indicate that assimilation does not foster an environment where Black people can authentically express their authentic selves at work. Participants in the interviews consistently reported that assimilation adversely affects their health, work experiences, and overall well-being, using terms such as ‘frustrating,’ ‘saddening,’ ‘helpless,’ and ‘exhausting’ to describe the impact (Brooks, 2023).

The exploitation of painful experiences and discrimination against women has given rise to a new conceptual paradigm known as ‘body authority.’ This paradigm empowers women to exercise autonomy over their bodies, even just healing and traumatic experiences, without being bound by any rules or moral constraints (Binder, 2021). Drawing from Lacanian theory, the female body soles the male observer, inciting his desire as he fruitlessly endeavors to restore a sense of completeness and unity (Binder, 2021). Therefore, feminists conclude that a woman’s body can be utilized for political purposes, and the crisis experienced by women is a result of a political arena being perceived as excessively male-oriented (El-Hissy, 2020).

In some countries, efforts are underway to formalize this paradigm into legal frameworks or legislation. In South Africa, the Muslim community has experienced dynamics surrounding the formalization of Muslim Personal Law (MPL) into legislation. MPL introduces a new paradigm related to the theological autonomy of women’s bodies, asserting their full rights over their bodies. However, this understanding has faced opposition from conservative ‘*Ulamā*’ in South Africa, who advocate for maintaining the status quo of traditional Islamic law, perpetuating patriarchal norms (Suleman, 2023). In Pakistan, existing laws do not grant women the autonomy to choose abortion under normal circumstances, nor do they address pregnancies resulting from rape. This article engages in an analysis, explanation, and discourse on the intersection of rape and abortion. It sheds light on the issue of pregnancy arising from sexual assault within the context of abortion legislation. The legal protections and support available to victims and their offspring are critically evaluated. The article examines rulings related to rape and abortion within both classical Islamic law and Pakistan’s contemporary legal system,

emphasizing fundamental, substantive, and procedural gaps in the legal framework (Minhas & Niazi, 2020).

Same as the scientific study of *fiqh dharūrāt* studied by Al-Bayanunī, where he believes that scientific studies of contemporary Islamic law problems are needed as an effort to answer the issues of the people in the world (Al-Bayānūnī, 2011). Pay special attention to emergencies and conditions impacting the creed level; faith is essential. Thus, considering *syarī'at* to establish emergency standards is a significant answer to the importance of issues concerning this matter, such as the legality of abortion rights. So, suppose Islam criticizes the propaganda of feminists by critical race theory regarding the legality of abortion rights through the study of *fiqh dharūrāt*. In that case, a gap point conflicts with *syarī'at* in its application.

c) The Relativism of Moral and Legal Standards in Postmodern Feminist Theory

The postmodern theory justified the legality of abortion rights without being bound by specific moral standards that were absolute. Thus, the assessment of good and lousy abortion behaviour was not left by society's justification but by the beliefs of the woman who performed the abortion. The moral of truth, according to pluralism, is an ambiguous concept. The conceptual diversity of truth may be divided according to diversity in the topics of discourse, such as scientific truth, moral truth, judicial truth, and political truth (Brahms, 2020). So, through these loose standards, the application of the legality of abortion rights with this theory will convey and give excessive freedom to women until they get out of the corridor of moral and ethical values and even religion unknowingly that was instilled and prevailed by the society long ago. Within the current philosophical discourse on abortion, three seemingly intractable debates take center stage: (1) the moral status of the fetus, (2) the extent of women's rights, and (3) the moral significance of the distinction between killing and letting die. The emergence of ectogenesis—a technological possibility enabling fetal development outside a gestational mother's womb—offers a distinctive context for exploring moral compromises (Simkulet, 2020).

Ethical and religious values are considered a control for humans, guiding them to the essence of goodness and moral values that differentiate human behavior from other living things. Exploring the boundaries of Islamic legal ethics involves identifying and articulating those limits and drawing comparisons with modern ethical categories. This comparative approach allows for envisioning alternative ethical frameworks rooted in

different rules, definitions, or other Islamic disciplines (Vishanoff, 2020). Thus, this theory will also impact the impasse over emergency standards that scholars should determine. The element of saving a mother's life is a standard that cannot be changed or reduced to the extent of women's interests by the refusal of social treatment and comments.

Wael B. Hallaq's observation regarding exploiting *ḍarūrāt* within contemporary legal discourse remains valid. However, it is essential to recognize that it is a legitimate instrument in legal theory. It has found application across various topics within legal literature and constitutes a fundamental device in Hanafite legal thought. Ibn 'Ābidīn justifies certain shifts in his legal doctrines by invoking factors such as changes in time (*ikhtilāf al-zamān*), societal corruption (*fasād ahl al-zamān*), and general necessity (*ḍarūrāt*). While these doctrinal adjustments may appear to diverge from the authoritative commitments of the school, Ibn 'Ābidīn contends that early authorities would have endorsed these new positions had they encountered the contemporary customs and compelling social needs of their era. The concept of necessities (*ḍarūrāt*) thus remains indispensable for Hanafite jurists as they evaluate and either accept or reject emerging social customs and practices (Ayoub, 2020).

Muḥammad Abu Al-Fattāḥ Al-Bayānūnī that even in discussing contemporary problems that require the opinions of scientific figures related to general science, Islamic scholars and experts must still be included (Al-Bayānūnī, 2011). Where almost all the views from the *fuqahā'* regarding the legality of abortion rights are based on the protection of the mother's life, so the dangerous emergency elements become a standard reference that applies at any time, considering the legality of abortion rights is one part of Islamic's goal towards the fulfillment of an emergency (*ḍarūrāt*). Also, the application of the concept of deconstruction to the social justification for women that they convey is only a pretext to justify what is done, even if it is contrary to religious and moral values, as a hidden interest to achieve their freedom. According to Cheema, this freedom is caused by the problem of the relationship of authenticity with the divine text (Al-Quran). The potential for divine texts to be affected by non-divine elements is realized through the interpretative framework inherent in these texts. This interpretative space allows for diverse interpretations, thereby maintaining the pluralistic nature of authenticity

(Cheema, 2020). This phenomenon arises from the understanding that divine texts are intended to endure over time, while external circumstances are inherently transient. Consequently, human agency plays a crucial role in ascertaining authenticity.

The assumption above has the consequence that no fixed and absolute law is derived directly from the divine text (Al-Quran), as it is entirely contingent upon individual human interpretation. Researchers need to clarify that the differences in interpretation among jurists (*fuqaha*) are limited to subsidiary issues (*furū'īyyah*), while they agree on fundamental aspects (*ushūliyyah*). The common ground among these jurists lies at the paradigmatic level, closely related to their Islamic worldview. The Islamic worldview held by jurists results from an epistemological process aimed at preventing secular thinking and avoiding the deconsecrating of values and desacralization, (Arroisi et al., 2023) This negates relativism in deriving legal principles from the divine text (Al-Quran). This absence of relativism reinforces the persistence of absolute values within the structure of Islamic legal thought, allowing for the dynamic infiltration of foreign values in line with changing times.

The legality of abortion rights is related to the *fiqh dharūrāt* thought that includes the standard level of emergency on the legality of abortion rights as Ḥusnī Muḥammad Al-Aṭṭar writes that if the mother is exposed to the danger resulting from this pregnancy and this danger directly threatens her life, and may lead to death (Muḥammad al-‘Aṭṭar, 2021). The disposal and abortion of the fetus become necessary to save the mother's life according to the rule of *fiqhiyyah*:

يُحْتَمَلُ الضَّرَرُ الْأَخْفَ لِدَفْعِ الضَّرَرِ الْأَشَدِّ

“Bear the lighter damage to pay the most severe damage.”

It is known that the mother's interest takes precedence over the fetus's interest, which can only be done through the doctor's trust. This will also have great potential to cause various polemics from the social, moral, health, and economic perspectives if the discourse on the legality of abortion rights, as feminists convey, is applied thoroughly. Among the crucial effects of social and moral impacts caused by giving the female body authority over the legality of abortion rights is that it will leave women to get abortions freely to avoid disgrace to their families, which is given by society's doctrine that women carry children without marriage is a sin and a violation of morals and religion. Finally, there will be no more moral considerations that protect women from all forms of

association with the opposite sex that deviate from ethical and religious values because they can access the legality of abortion rights whenever they need to.

Based on the impact that the legality of abortion rights can cause, it can not provide the best solution to prioritize the authority of women's bodies and rights because it is the same as an effort to eliminate the problems experienced by women by bringing new issues then, so it is not the best problem solver behind the movement of equality and support for women's rights and choice of body. Therefore, Islam has stipulated the provisions of the implementation of the legality of abortion rights based on emergency endangering the mother as the main reason.

D. Conclusion

The presence of issues and discourses regarding abortion was a problem that continues to be debated by society; among the efforts undertaken by feminists as pioneers and prominent supporters were the use of various theories within Feminist Legal Theory to emphasize supporting arguments for their campaign for the legality of abortion rights in legal aspects and policy implementation, including the First, Dominance Feminist theory, where they used the elements of the historical facts in the past that made the patriarchal system and male domination as weapons of oppression and violence against women In the context of seeking their rights over body authority. The Second, Critical Race Feminist theory was a theory that used the standard consideration of women's discrimination experiences between white women and black women that create the issue of reproductive health as a form of fulfilling the right of all women authority to get reproductive health services and determine the future of their bodies. The third is Postmodern feminist theory, which started from the doctrine of feminist thinking that every woman should be supported and fulfilled to become a mother mentally, economically, or psychologically. All of these feminist legal theories show that the core of their help to legalize abortion rights was the women's experience as the fulfillment of women's rights. *Fiqh ḍarūrāt* views the legality of abortion rights as an effort undertaken to save the mother's life due to a medical reason that posed a threat to her life. Thus, the leading standard in *fiqh ḍarūrāt* was considered a dangerous emergency to fulfill the life safety element stated in the *maqāshid al-sharī'ah*. So based on that, these feminist legal

theories show that the core of their support was the interest of women as the main subject in fulfilling the legality of abortion rights, contrasting with *fiqh dharūrāt*. This was because the standards they create to accommodate abortion become relative and can change or decrease due to the evolving times, following what they perceive as necessary to fulfill women's rights. However, this propaganda contradicts moral values, social and cultural norms, and religious principles.

References

- Abū Al-Ḥārith Al-Ghazī, M. Ṣidqī bin A. bin M. A.-B. (1416). *Al-Wajīz Fī ʿĪdāḥī Qawāʿid al-Fiqhiyyah al-Kulliyyah*. Mu'assasah al-Risālah al-ʿIlmiyyah.
- Al-Bayānūnī, M. A. al-Faṭḥ. (2011). *Fiqh al-Darūrāt: Maʿālimuhu wa Ḍawābiṭuhu*. Dār al-Iqrāʾ.
- Al-Buṭī, M. S. R. (2003). *Maʿa al-Nās Masyrūʾāt wa Fatwā*. Dar al-Fikrī.
- Al-Dubayān, A. ʿUmar D. bin M. (1426). *Mausūʿah Ahkām al-Ṭahārah* (Vol. 8). Maktabah Al-Rusyd.
- Al-Fayūmī, A. bin M. bin ʿAlī. (1909). *Al-Miṣbāḥ al-Munīr fī Gharīb al-Syarḥ al-Kabīr*. Al-Maktabah al-ʿIlmiyyah.
- Ali, A. (2005). *Keterpurukan Hukum di Indonesia (Penyebab dan Solusinya)* (Kedua). Ghalia Indonesia.
- Al-Zubaidī, M. bin ʿAbdul R. A.-Ḥusainī. (1965). *Tāj al-ʿUrūs min Jawāhir al-Qāmus* (Vol. 10). Dār al-Hidāyah.
- Al-Zuhailī, W. bin M. (1405). *Naẓariyyāt al-Darūrat al-Syarʿiyyah*. Mu'assasah al-Risālah.
- Al-Zuhailī, W. bin M. (1418). *Al-Tafsīr al-Munīr fī al-ʿAqīdah wa al-Syarʿiyyah wa al-Manhaj*. Dār al-Fikr al-Muʿāṣir.
- Arroisi, J., Zarkasyi, H. F., & Roini, W. (2023). The Relevance of Contemporary Epistemology on Existing Knowledge: A Critical Analysis of Western Scientific Worldview According to Al-Attas Perspective. *Afkar: Jurnal Akidah Dan Pemikiran Islam*, 25(2). <https://doi.org/10.22452/afkar.vol25no2.7>
- Askia, R., Shafira, E., & Pertiwi, A. D. (2024). Socio Scientific Issue Tindakan Aborsi Akibat Pemerkosaan Ditinjau dari Perspektif Hukum Islam, Bioetika Kedokteran dan Hukum di Indonesia. *Islamic Education*, 3(2).
- Ayoub, S. (2020). "Neither Desiring It, nor Transgressing Its Limits:": Ethical Hierarchy in Islamic Law. In D. R. Vishanoff (Ed.), *Islamic Law and Ethics*. International Institute of Islamic Thought. <https://www.jstor.org/stable/j.ctv19pr5b.6>
- Azizah, N., & Rafsanjani, R. (2022). Abortion Law due to Illness and Rape Victims in the Perspective of Islamic Law, Common Law System, Civil Law System. *Spectrum Journal of Gender and Children Studies*, 2(2). <https://doi.org/10.30984/spectrum.v2i2.412>
- Bambang Waluyo. (1996). *Penelitian hukum dalam praktek* (Cet. 2). Sinar Grafika.
- Beddu, M. J., & Putri, N. H. R. (2022). Aborsi dalam Perspektif Undang-Undang No. 36 Tahun 2009 Dan Hukum Islam. *Addayyan*, 17(1).
- Binder, S. (2021). The Female Victim; Whose Story Is Written on Her Dead Body? Exploring the Gender Politics of Writing Female Victims and Their Traumas. In *Women and Crime in Post-Transitional South African Crime Fiction: A Study of*

- Female Victims, Perpetrators and Detectives.* Brill.
<http://www.jstor.org/stable/10.1163/j.ctv1sr6j0t>
- Brahms, Y. (2020). *Philosophy of Post-Truth*. Institute for National Security Studies.
<http://www.jstor.org/stable/resrep23537>
- Brooks, A. A. (2023). *The Intelligent Code Switcher: The Effects of Racial Code Switching on Perceived Intelligence*. Muhlenberg College.
<https://www.jstor.org/stable/community.35273686>
- Brown, K. (2022). Understanding the Role of Race in Abortion Stigma in the United States: A Systematic Scoping Review. *Journal of Sexual and Reproductive Health Matters*, 30(1).
- Brown, L. M. (2005). *On Female Body Experience*. Oxford University Press.
- Butler, J. (1994). *The Postmodern Turn: New Perspectives on Social Theory*. Cambridge University Press.
- Cheema, H. A. (2020). Construction of Authenticity in Islamic Law: An Analysis of Polygamy, Divorce, and Political Participation of Women. *Islamic Studies*, 59(4).
<https://www.jstor.org/stable/27088413>
- Cockrill, K., & Nack, A. (2013). I'm Not That Type of Person: Managing the Stigma of Having an Abortion. *Deviant Behavior Journal*, 34(12).
- Edman, R. S. (1997). Feminism, Postmodernism and Thomism Confront Questions of Gender. In A. O. Simon (Ed.), *Postmodernism and Christian Philosophy*. American Maritain Association.
- El-Hissy, M. (2020). Of Maidens and Virgins or, Sparking Military Alliance the Affective Politics of the Pristine Female Body. In *Strategic Imaginations: Women and the Gender of Sovereignty in European Culture*. Leuven University Press.
<https://doi.org/10.2307/j.ctv1bd4h91.6>
- Fassin, D. (2001). The Biopolitics of Otherness: Undocumented Foreigners and Racial Discrimination in French Public Debate. *Royal Anthropological Institute of Great Britain and Ireland*, 17(1).
- Grosz, E. A. (1994). *Volatile Bodies: Toward a Corporeal Feminism*. Indiana University Press.
- Hakiim, A., Abdullah, M., & Romelah. (2022). Tindakan Aborsi Akibat Pemerkosaan Ditinjau Menurut Pandangan Islam, Bioetika Kedokteran dan Hukum di Indonesia. *Jurnal Health Sains*, 3(3).
- Heymann, J., Sprague, A., & Raub, A. (2023). Gender Discrimination at Work. In *Equal Rights at Work for Women Must Mean All Women*. University of California Press.
<https://www.jstor.org/stable/jj.1791908.8>
- Hudiyani, Z. (2021). Diskursus Aborsi Dalam Perspektif Fikih Klasik Dan Kontemporer. *Al-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga Dan Peradilan Islam*, 2(1).
<https://doi.org/10.15575/as.v2i1.12172>
- Humaira, F. (2023). Analisis Aborsi Bagi Perempuan Menikah Di Kecamatan Tanjung Pura. *Journal Smart Law*, 1(2).
- Ibn Taymiyyah Al-Harānī, T. A. al-‘Abbās A. bin ‘Abdul Ḥalīm. (1416). *Majmu' Al-Fatāwā* (Vol. 38). Fahd litibā'ati al-Muṣḥaf al-Syarīf Al-Madīnah al-Nabawiyyah al-Mamlakah al-‘Arabiyyah al-Sa‘ūdiyyah.
- KY, E., K, D., & GE, E. (2016). Black Lives Matter: Claiming a Space for Evidence-Based Outrage in Obstetrics and Gynecology. *Public Health Journal*, 106(10).

- Lang, K., & Spitzer, A. K.-L. (2020). Race Discrimination: An Economic Perspective. *The Journal of Economic Perspectives*, 34(2). <https://www.jstor.org/stable/26913185>
- Levit, N., & Verchick, R. R. M. (2006). *A Primer: Feminist Legal Theory*. NYU Press.
- Minhas, Q. A. M., & Niazi, S. M. (2020). Abortion and Rape Laws in Pakistan: A Sharī'ah-Based Analysis. *Islamic Studies*, 59(3). <https://www.jstor.org/stable/27088401>
- Muhaimin. (2020). *METODE PENELITIAN HUKUM* (Pertama). Mataram University Press.
- Muhammad al-'Attar, Husnī. (2021). *Al-Samāḥah al-Islāmiyyah fī Darūrat al-Syar'iyyah*. Mu'assasah Nāfidz lil Bahts wa al-Tibā'ah wa al-Nasyr.
- O'Reilly, A. (Ed.). (2021). *Maternal Theory: Essential Readings* (2nd ed.). Demeter Press.
- Rivera Rodriguez, G., Tamayo Acosta, J., Sosa Gomez, A. E., Marcucci Rodriguez, R. E., Rodriguez Cintron, G. A., & Acosta, M. (2022). The Medical and Financial Burden of Illegal Abortion. *Cureus*. <https://doi.org/10.7759/cureus.30514>
- Ross, L. J. (2016). *The Color of Choice: White Supremacy and Reproductive Justice*. In *Color of Violence: The INCITE Anthology*. Duke University Press.
- Ross, L. J. (2017). Reproductive Justice as Intersectional Feminist Activism. *Souls Journal*, 9(3).
- Sagala, N. K. A., Khatami, N., & Lubis, F. (2023). Pidana Aborsi Dalam KUHP. *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga*, 5(3). <https://doi.org/10.47467/as.v5i3.2946>
- Shahaluddin, H. (2022a). *Ideologi Gender dalam Studi Islam*. INSISTS.
- Shahaluddin, H. (2022b). *Indahnya Kekeragaman Gender dalam Islam*. INSISTS.
- Simkulet, W. (2020). Abortion and Ectogenesis: Moral Compromise. *Journal of Medical Ethics*, 46(2). <https://www.jstor.org/stable/27197783>
- Siraj, H. (2015). Kesaksamaan & Persamaan Gender: Pro dan Kontra Dari Perspektif Sosial dan Agama. *Jabatan Agama Islam Selangor (JAIS)*.
- Solikin, N. (2021). *PENGANTAR METODOLOGI PENELITIAN HUKUM* (Pertama). CV. Penerbit Qiara Media.
- Sovia, S. N., Hasbullah, A. R., Mustakim, A. A., Setiawan, M. A. R., Rais, P., & Rizal, M. C. (2022). *Ragam Metode Penelitian Hukum*. Kediri: Lembaga Studi Hukum Pidana, Excellent, 12.
- Stedman, T. L. (2008). *The American Heritage Medical Dictionary*. Houghton Mifflin Publisher.
- Suleman, M. (2023). Muslim Personal Law, Yes and No: Religious Leader's Views on its Legalization. *Journal for the Study of Religion*, 36(1). <http://dx.doi.org/10.17159/2413-3027/2023/v36n1a>
- Suryani, L. (2021). Faktor-Faktor Pendorong dan Praktik Aborsi di Indonesia. *Jurnal Studi Gender Dan Anak*, 8(2). <https://doi.org/10.32678/jsga.v8i02.5506>
- Syafuri, H. B., & Wahyudin, M. (2022). Perbandingan Hukum Terkait Aborsi Hasil Pemerkosaan Menurut Hukum Islam dan Positif. *Formosa Journal of Social Sciences (FJSS)*, 1(3). <https://doi.org/10.55927/fjss.v1i3.939>
- Tama, Y. A., & Rachmat, I. (2023). Aborsi: Kajian Dalam Perspektif Hukum Islam Dan Peraturan Perundangan Di Indonesia. *Mandub : Jurnal Politik, Sosial, Hukum Dan Humaniora*, 1(4). <https://doi.org/10.59059/mandub.v1i4.464>

- Vishanoff, D. R. (2020). The Ethical Structure of Imām al-Haramayn al-Juwaynī's Legal Theory. In *Islamic Law and Ethics*. International Institute of Islamic Thought. <https://www.jstor.org/stable/j.ctv19pr5b.5>
- West, R., & Bowman, C. G. (2019). *Research Handbook on Feminist Jurisprudent*. Edward Elgar Publishing.
- Winters, E., & Esposito. (2010). Other People's Daughters: Critical Race Feminism and Black Girls Education. *Journal of Educational Foundations Journal*, 24(1).
- Yusdani. (2022). Aborsi Aman Sebagai Solusi Alternatif Atas Tingginya Angka Kematian Ibu Di Indonesia Dalam Tinjauan Ham Dan Hukum Islam. *Tesis, Universitas Islam Indonesia, Yogyakarta*.